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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRANDY JOHNSON, Defendant and Appellant.	A152707 (San Francisco County Super. Ct. No. SCN206196)

Brandy Johnson stabbed her mother in the face causing serious injury and was found not guilty by reason of insanity (NGI). In 2008, she was committed by the court to the State Department of Hospitals. Her commitment was extended by two years in 2015 and again, after a jury trial, by two more years in 2017. In this appeal, Johnson challenges the court's 2017 order extending her commitment on two grounds.

First, Johnson contends the trial court wrongly interpreted the NGI extension statute, Penal Code section 1026.5,[1] and violated her due process rights by instructing that the People's burden of proving her current dangerousness due to a mental disease or disorder did not require them to prove anything about the effect of treatment or medication on her behavior. Recognizing the only published appellate court decision to address the issue interpreted the statute[2] in a manner that supports the instructions given

[1] All further section numbers refer to sections of the Penal Code.

[2] An extension proceeding under the NGI statute is civil in nature (*People v. Martinez* (2016) 246 Cal.App.4th 1226, 1238) although the committed person is entitled

(see *People v. Bolden* (1990) 217 Cal.App.3d 1591 (*Bolden*)), Johnson urges this court to reject that interpretation as wrong and violative of her due process rights. We conclude the *Bolden* opinion is well-reasoned, adopt its statutory interpretation and rely on it to conclude that Johnson's due process challenge lacks merit.

Second, Johnson argues the court's instruction violated her equal protection rights. She contends NGIs are similarly situated to mentally disordered offenders (MDOs) for purposes of extending commitment and thus the two should be treated similarly. She points out that the MDO extension of commitment statutes do not require an MDO to prove medication or treatment renders her no longer dangerous. The People contend Johnson has forfeited this claim by failing to assert it in the trial court. We agree.

We therefore affirm the order.

BACKGROUND

Johnson was charged with various offenses for stabbing her mother in the face with a knife in 2006. She ultimately pleaded, and the court found her, not guilty by reason of insanity. After an evaluation by state medical professionals, Johnson was committed to a state hospital. Her maximum term of commitment, which is the maximum term for which she could have been imprisoned if convicted of the underlying offense, was set at seven years with about two years credit for time served. In 2013, the People moved to extend her commitment under section 1026.5, which after a hearing the court granted. In 2015, the People again petitioned to extend the commitment, Johnson consented, and her commitment was extended until August 12, 2017.

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to certain rights guaranteed in criminal proceedings (see § 1026.5, subd. (b)(3), (4) & (7)). The People are the petitioner and the committed individual is the respondent. However, this terminology becomes confusing on appeal, where either party may be the respondent depending on who has appealed the order. For clarity, we will refer to the committed individual as the "defendant," which is their designation in the original criminal proceeding.

In 2017, the People filed a third petition to extend Johnson's commitment, which Johnson opposed. A jury trial on that petition was held in September 2017.[3] The People presented medical records and the testimony of Johnson's treating psychologist at Napa State Hospital, which showed that Johnson suffered from schizoaffective disorder, a combination of schizophrenia and a mood disorder, with symptoms including paranoia, hearing voices, disturbing thoughts, a depressed affect, irritableness and agitation. Johnson had an ongoing delusion that someone had killed her mother. Due to her mood disorder, she was often unwilling to get out of bed, which resulted in her declining to get certain treatment or participate in certain activities and sometimes required hospital staff to bring her medications to her room. Johnson's mental disorder was the same disorder that led to her committing the underlying offenses.

The psychologist testified that, although Johnson was taking medication to alleviate her symptoms, she continued to exhibit paranoia and other symptoms. This was because schizoaffective disorder is resistant to treatment. There had been several incidents at the hospital in which Johnson experienced paranoia and delusions and demonstrated dangerous and threatening behavior toward other patients. She had accused hospital staff of talking about her, spitting in her food and stealing from her; had threatened staff and patients, including with physical harm and death; had become severely agitated and could not be redirected, necessitating intervention by staff and police; and had swung her walker at a patient and a staff member.

The psychologist testified that, because Johnson's symptoms were continuing, she had difficulty controlling her dangerous behavior. Notwithstanding her medication, she would continue to pose a danger of physical harm to others without the support of the hospital team. If she did not take her medication, she would be even worse. She posed a substantial danger of physical harm to others and had serious difficulty controlling her

[3] The parties apparently stipulated to allow the trial to commence about a month after her maximum term of commitment ended.

dangerous behavior as a result of her mental disorder. The psychologist was unsure whether Johnson would continue to take her medication in an unsupervised environment.

Johnson and her mother testified on Johnson's behalf. Johnson said that at the time that she stabbed her mother, she was not taking her medication. During the incident, she said to her mother "you're not my mom." Her mother was asleep before the incident, opened her eyes and saw Johnson charging at her, and the knife went into her face. Johnson's mother had corrective surgery on her nose.

Johnson acknowledged that prior to the incident, she had been hospitalized on about 20 different occasions for psychiatric problems, and each time she was released she had stopped taking her medication. She said she was different now. She had not previously believed she was mentally ill, but now she understood that she was and took her medication. She understood she would need medication for the rest of her life and would continue to take her prescribed psychotropic medications. She planned to live with her mother and would rely on her mother or San Francisco General Hospital in a crisis. Her mother would assist her with taking her medications. She also planned to continue receiving treatment at a facility in the community. As for some of the incidents her treating psychologist described, she disagreed in some respects with the description of what happened, and in other respects she explained why she acted the way she did.

The jury found the People proved beyond a reasonable doubt that Johnson suffered from a mental disease, defect or disorder, as a result of which she posed a substantial danger of physical harm to others and had serious difficulty controlling her dangerous behavior. It further found Johnson failed to prove by a preponderance of the evidence that she did not pose a substantial danger of physical harm to others because she was taking medicine that controlled her mental condition.

The court subsequently ordered Johnson recommitted for two more years. Johnson filed a timely notice of appeal from this order.

DISCUSSION

I.

The Law Governing Extension of Commitments of NGIs.

Once a defendant is committed, he or she may be released under one of two circumstances. (§ 1026.1.) The first is pursuant to a two-step process in which the court determines whether the defendant would pose a danger if supervised and released to a community facility for outpatient care, and if it concludes she would not and places her in such a facility, determines at the end of a year whether she has been restored to sanity. (*Id*., subd. (a); § 1026.2.) The second type of permitted release, which is at issue here, follows a petition of the prosecuting attorney, based on reports of the treatment facility, supporting evaluations and hospital records, to extend the defendant's commitment beyond her maximum term. (§ 1026.5, subd. (a)(1), (b)(1).) The defendant is entitled to a jury trial at which she is entitled to be present and have counsel, to discovery under criminal rules, to appointment of psychologists or psychiatrists and to "the rights guaranteed under the federal and State Constitutions for criminal proceedings." (*Id*., subd. (b)(2)–(7).) The prosecution bears the burden of proof beyond a reasonable doubt. (*People v. Wilder* (1995) 33 Cal.App.4th 90, 98; *People v. Buttes* (1982) 134 Cal.App.3d 116, 125.) If the jury finds the patient was "committed under Section 1026 for a felony and by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others," the court shall order her recommitted for an additional period of two years. (§ 1026.5, subd. (b)(1), (8).) Further extensions can be sought at two-year intervals thereafter.

II.

Johnson's Statutory Interpretation and Due Process Challenges Lack Merit.

At trial, both parties proposed, and the jury was given, the standard CALCRIM instruction, No. 3453. That instruction stated that the jury should decide whether Johnson currently posed a substantial danger of physical harm to others as a result of mental disease, defect or disorder; that the People had the burden to prove beyond a reasonable doubt that Johnson suffered from a mental disease, defect or disorder and, as a

result, currently posed a substantial danger of physical harm to others and had serious difficulty controlling her dangerous behavior; and that controlling the mental condition through medication was a defense requiring Johnson to prove by a preponderance of the evidence that she no longer posed a substantial danger of physical harm to others because she was taking medicine that controlled her mental condition and would continue to take that medicine in an unsupervised environment.

Johnson does not challenge that instruction. Rather, she focuses on a special instruction the trial court gave based on *Bolden, supra*, 217 Cal.App.3d 1591. It directed the jury to determine whether Johnson had a mental disorder that rendered her dangerous and had serious difficulty controlling her dangerous behavior "*without regard to the effect of treatment or medication upon her behavior*." (Italics added; see *id*. at p. 1600.)

Johnson first urges us to hold this instruction was erroneous because it was based on the *Bolden* court's incorrect interpretation of section 1026.5.[4] She claims that interpretation effectively shifted the burden of proving she is dangerous in her current condition from the People to her, thus lowering the prosecution's burden of proof in violation of her due process rights. We disagree.

The *Bolden* court arrived at its interpretation by comparing the language of section 1026.5, which addresses unconditional release, with the language of section 1026.2, which addresses the conditional release of an NGI to supervised outpatient treatment.[5] In section 1026.2, the Legislature explicitly required the court to

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[4] Johnson makes her arguments about *Bolden* in a brief section with a heading about due process, but some of her arguments critique *Bolden*'s statutory interpretation of section 1026.5.

[5] Section 1026.2 also provides for unconditional release following a year of outpatient treatment if it is determined the patient's sanity has been restored. The same court that issued *Bolden* had previously interpreted that provision to allow unconditional release if, taking into account the effect of treatment, including medication, the defendant is no longer dangerous. (*People v. Williams* (1988) 198 Cal.App.3d 1476, 1480.) The *Bolden* court declined to revisit that holding. (*Bolden, supra*, 217 Cal.App.4th at p. 1598.)

determine, before placing the defendant in an outpatient program, that he or she " 'will not be a danger to the health and safety of others . . . *while under supervision and treatment* [in the community].' " (*Bolden*, *supra*, 217 Cal.App.3d at p. 1598, quoting § 1026.2, subd. (e).) Section 1026.5 does not contain such qualifying language, and the *Bolden* court concluded this was no accident. Section 1026.5, unlike section 1026.2, subdivision (e), involves *un*conditional release, i.e., release into the community without any requirement of supervision or treatment. In that circumstance, where it cannot be presumed that the defendant will be supervised or medicated or receive treatment, the Legislature was addressing the danger a defendant posed without any of those supports. (See *Bolden*, at p. 1599 [The Legislature's failure in section 1026.5 to define "dangerous" in terms of behavior while under treatment was "no mere oversight" because in the case of an unconditional release, "the released person leaves the psychiatric facility without further supervision or compulsory treatment"].)

The instructions the trial court gave here, including the special instruction challenged by Johnson, are consistent with the *Bolden* court's interpretation of section 1026.5, and Johnson does not argue otherwise. Those instructions placed on the People the burden of proving Johnson's mental disease resulted in her being dangerous and unable to control her behavior without regard to medication or treatment. But they allowed the jury to consider the effect of her medication on her dangerousness in the context of an affirmative defense. Specifically, Johnson could show by a preponderance of the evidence that the medication rendered her no longer dangerous and she would continue to take it. Insofar as Johnson's argument is a challenge to *Bolden*'s interpretation of the statute, we reject her argument.

As for Johnson's due process argument, Bolden, like Johnson, argued that he could not constitutionally be required to prove he was not dangerous while medicated and would take his medication, and contended that due process required the People to prove the absence of those facts beyond a reasonable doubt. (*Bolden*, *supra*, 217 Cal.App.3d at pp. 1600–1602.) The *Bolden* court first observed that " 'the Due Process Clause [does] not invalidate every instance of burdening the defendant with proving an exculpatory

fact.' [Citation.] It is constitutional to require a criminal defendant to bear the burden of proving an affirmative defense by a preponderance of the evidence. [Citation.] . . . [I]n this context, an affirmative defense is one which does not negate any element of the crime, but is new matter which excuses or justifies conduct which would otherwise lead to criminal responsibility." (*Id*. at pp. 1600–1601.) The court explained that the medication defense is an affirmative defense because it does not negate the three elements the People are required to prove under section 1026.5: that the defendant committed a felony resulting in commitment, that he suffers from mental disease, defect or disorder, and that the disease, defect or disorder causes him to be dangerous. (*Bolden*, at pp. 1601–1602.) The defense—"(1) medication makes him not dangerous and (2) he will take his medication without fail in the future in an unsupervised environment"—is not "logically inconsistent" with the truth of the elements of the People's case. (*Id*. at pp. 1601–1602.)

Johnson cites no decision that has rejected *Bolden*'s interpretation of section 1026.5 or its holding that its interpretation does not violate due process. Nor are we aware of any. Johnson criticizes *Bolden*'s analysis, contending that "[w]hether a person is able and likely to manage their mental illness without being confined for treatment is at the very heart of a [section] 1026.5 trial" and "cannot be neatly separated out." She further argues that the instruction given here—that the jury was to decide whether she had a mental disorder that rendered her dangerous without regard to the effect of treatment or medication on her behavior—"removed the immediacy of the condition from that which the prosecution had to prove, thereby lightening the burden of proof." Section 1026.5, Johnson posits, " 'speaks [only] to the *present* proclivities of the individual.' " The trial does "not" concern "his or behavior under future changes." The implication of Johnson's argument is that a patient's current condition is that of a person who is medicated and receiving treatment, and dangerousness must therefore be assessed under those conditions.

The *Bolden* court rejected a very similar argument. There, the prosecutor argued that Bolden would in the future stop taking his medications and decompensate, and

Bolden contended the reference to his "propensity for future dangerous behavior" was reversible error because only his " 'present condition' " was pertinent at a [section] 1026.5 hearing. (*Bolden, supra,* 217 Cal.App.3d at p. 1604.) The court disagreed, stating "[t]he issue under section 1026.5 [subdivision] (b) is whether Bolden 'represents' a substantial danger of physical harm to others. In making this determination, the jury must be able to appropriately consider whether, based on his *present* condition, he poses such a danger if placed in an unsupervised environment." (*Id*. at p. 1605.)

We agree with the *Bolden* court. In evaluating the risk of harm a patient poses if she is released unconditionally, the jury must necessarily make both a present and a forward-looking assessment. It evaluates her present status and decides whether, in light of it, she will be a danger to others going forward if released without supervision. We reject Johnson's contention otherwise.

Johnson next argues that if the prosecution is not required to shoulder the burden of proving the effects of medication and treatment do not eliminate the defendant's dangerousness, its burden will be lessened. All the People will have to show, she contends, is "that the person still suffers from a mental illness," since the dangerousness without regard to treatment or medication can be proven based solely on the commitment offense. We disagree. Johnson's argument ignores the substance of the jury instructions, which made clear that the focus of the jury's determination was not Johnson's past condition or prior offense but rather her current status. The court instructed the jury to "decide whether [Johnson] *currently* poses a substantial danger of physical harm to others as a result of mental disease, defect or disorder." (Italics added.) The court told the jury it was "*not* being asked to decide Brandy Johnson's mental condition *at any other time* or whether she's guilty of any crime," and that "[t]o prove that Brandy Johnson is *currently* both a substantial danger of physical harm to others as a result of mental disease or defect or disorders the people must prove beyond a reasonable doubt that one, she suffers from mental disease[,] defect or disorder; and, two, as a result of her mental disease[,] defect or

disorder she *now* A, poses substantial danger of physical harm to others; and B, has serious difficulty in controlling her dangerous behavior." (Italics added.)

The instruction Johnson challenges did not undermine these instructions, nor does it suggest the jury was to decide Johnson's dangerousness based solely on her past acts in committing the underlying crime. It stated, "[t]he issue of whether Brandy Johnson as a result of mental disease, defect or disorder *now* poses a substantial danger of physical harm to others and *has* serious difficulty in controlling her dangerous behavior is to be decided without regard to the effect of treatment or medication upon her behavior. However, the effect of medication in controlling Ms. Johnson's dangerousness and whether she will self-medicate in an unsupervised environment may be raised by Ms. Johnson as a defense." (Italics added.) This instruction, which we consider together with the other instructions (see *People v. Huggins* (2006) 38 Cal.4th 175, 192), made plain that the issue for the jury to decide was whether, in her *current* condition, Johnson "*now* poses a substantial danger" and "has serious difficulty in controlling her dangerous behavior," not whether she posed such a danger or had difficulty with controlling her behavior 11 years earlier when she stabbed her mother. To be sure, her past diagnosis and conduct were relevant to that determination, but the instructions in no way suggest they were dispositive.

Nor did the People rely solely or primarily on evidence of Johnson's prior crime to demonstrate her current danger and lack of control. As we have discussed, the People proffered evidence of several recent incidents reflecting her ongoing paranoia, delusions and related threats of physical harm and death, and presented expert testimony about her inability to control her symptoms and related dangerous conduct even while medicated. The evidence also included basic information about the commitment crime and (regarding whether she would self-medicate) her history of refusing to medicate at earlier times. But the jury was not told to rely solely on her commitment offense and the events surrounding that offense. We do not presume it failed to make the determination it was

instructed to make: whether because of her mental disorder she *currently* posed a danger to others and had serious difficulty controlling her dangerous behaviors.[6]

Johnson also suggests that the special instruction meant the prosecution did not have to address (and the jury could ignore) the effects of her treatment on her current condition. We disagree. While the instruction could have been worded more clearly, the jury was not likely to understand it should ignore the effects of Johnson's prior treatment and medication and imagine she had not been treated or medicated previously. Rather, reading all the instructions together (see *People v. Huggins, supra,* 38 Cal.4th at p. 192), the jury more likely understood it should assess whether Johnson would be dangerous and unable to control her behavior if she did not continue treatment and medication. The prosecutor made this point twice in closing argument. First, he explained that deciding Johnson's status "without regard to the [e]ffect of treatment or medication on her behavior" meant simply "what is she like when she's not medicated, when she's not being treated?" Second, he acknowledged his burden was "to prove beyond a reasonable doubt that in an[] unmedicated condition Ms. Johnson represents substantial danger of physical harm to others."

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[6] Johnson also points to a snippet of the prosecutor's rebuttal portion of closing argument to support her argument that the jury was misled by the instruction into thinking the People only needed to show her prior offense and current mental illness. We have reviewed the entire set of closing arguments, and do not believe this comment had the effect Johnson claims it did. In his closing argument, the prosecutor did not rely solely or primarily on Johnson's commitment offense. He discussed the incidents about which Johnson's psychologist testified, such as that Johnson yelled at and threatened other patients and hospital staff. The prosecutor argued these incidents showed she currently posed a danger and could not control her behavior. He also discussed the hospital staff's inability on many of those occasions to redirect her, which he argued showed she was unable to control her behavior. And he pointed to the evidence that she continued to experience delusions that led to some of this behavior. The prosecutor's closing argument, considered in its entirety, did not suggest his burden of showing Johnson presented a substantial danger in an unmedicated state was met by her commitment offense and current diagnosis alone.

Finally, Johnson claims the special instruction wrongly "encouraged the jury to speculate about what appellant would be like without treatment or medication." Again we disagree. The evidence of her actions while unmedicated and not in treatment, including the commitment offense, coupled with her more recent conduct while medicated and in treatment, shed considerable light on that issue. So did the opinion testimony of her treating psychologist, who testified about the symptoms and behaviors Johnson continued to exhibit even with treatment and medication and opined that without medication she would be "worse." Nothing about the instruction encouraged the jury to speculate, and the evidence of her ongoing symptoms and conduct did not require it to do so.[7]

Having concluded the special instruction did not violate Johnson's right to due process, we need not address her argument that she was prejudiced.

III.

Johnson Has Forfeited Her Equal Protection Claim.

Johnson also challenges the "*Bolden* instruction" on equal protection grounds. She contends the instruction is "unique to NGI extensions" and "does not apply to extension trials of someone committed as a[n] [MDO]." Relying on cases such as *People v. Noble* (2002) 100 Cal.App.4th 184, she contends NGIs and MDOs have been treated as similarly situated for other purposes and should be held similarly situated with respect to the burden of proof on the issue of medication. She also contends the state has no "compelling reason" that would justify their disparate treatment.

The People, along with challenging the merits of Johnson's argument, contend Johnson forfeited her equal protection challenge to the instruction by failing to raise it in the trial court. Johnson acknowledges the record reflects counsel objected to the instruction but does not reflect the grounds for the objection. She contends the issue here

[7] While we conclude the special instruction was not erroneous when considered in the context of all the instructions (and, for that matter, the evidence and arguments), it is unnecessary and, standing alone, potentially confusing, and we do not encourage its use.

is one of law that does not require resolution of disputed factual issues and may, therefore, be raised for the first time on appeal. She cites *People v. Dunley* (2016) 247 Cal.App.4th 1438 (*Dunley*), in which the court exercised its discretion to decide an equal protection challenge that had not been preserved by an appropriate objection in the trial court. (*Id.* at p. 1447.)

We agree with the People that Johnson has forfeited her equal protection challenge. That this court has discretion to consider an issue that was not raised below does not mean we must do so. Further, *Dunley* is of no aid to Johnson. There, the court excused the defendant's failure to raise the equal protection issue in the trial court because, at the time of the trial court hearing, published authority authorized what defendant claimed was prohibited and "it would not have been unreasonable to assume that an objection would have been futile" based on that authority. (*Dunley*, *supra*, 247 Cal.App.4th at p. 1447.) Here, by contrast, Johnson relies for her equal protection argument on cases that were decided well before the September 2017 trial of the extension petition, including *People v. McKee* (2010) 47 Cal.4th 1172, *Dunley*, *supra*, 247 Cal.App.4th 1438 [2016], *People v. Curlee* (2015) 237 Cal.App.4th 709, and *People v. Noble*, *supra*, 100 Cal.App.4th 184 [2002].[8] She has not shown futility or any other excuse for her failure to raise the issue below.

We therefore decline to reach this issue. We do so with the awareness that the Legislature has adopted separate statutory schemes for NGIs and MDOs, and that while there are similarities between them, there are also differences, not the least of which is that, unlike an MDO, an NGI has proved by a preponderance of the evidence that she was insane at the time of the crime and has been acquitted on that basis but subjected to commitment based on her mental condition. (See *Bolden*, *supra* 217 Cal.App.3d at p. 1599 ["By definition, the only persons coming within section 1026.5's framework are

[8] *People v. Alsafar* (2017) 8 Cal.App.5th 880, which Johnson also cites, simply adopted the reasoning of *Dunley*, and even *Alsafar* was decided in February 2017, seven months prior to the trial in this case.

felons who have previously proven their own insanity"].) The question Johnson asks us to decide is whether the equal protection clause requires that MDOs and NGIs be treated alike for purposes of who shoulders the burden of proving the efficacy of medication on dangerousness and the likelihood the individual will self-medicate. This in turn depends on whether they are similarly situated with respect to release from commitment and the procedures governing release, the appropriate level of constitutional scrutiny to be applied and the nature and importance of the interests the state may have in treating them differently for this purpose. The first and second of these are essentially legal issues. But in *People v. McKee*, *supra*, 47 Cal.4th 1172, our high court recognized that the third—that is, the justification for the differential treatment of sexually violent predators and MDOs—may entail a factual showing. (*Id*. at p. 1208 [remanding to give People opportunity to show sexually violent predators presented a greater risk to society, and therefore imposing on them a greater burden before they can be released from commitment is needed to protect society].) The court in *McKee* declined to allow the People to rely on legislative findings alone, requiring evidence to support the reasons for the differential treatment. (*Id*. at pp. 1206–1207; see also *People v. McKee* (2012) 207 Cal.App.4th 1325, 1340–1342 [describing evidence proffered on remand].) Here, Johnson's failure to raise the equal protection issue below deprived the People of the opportunity to make any such factual showing. This, too, counsels against exercising our discretion to decide the issue.

DISPOSITION

The order is affirmed

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.